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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1962

No. 1008

W. R. ARTHUR & CO., INC.,

Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION,

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

APPELLANT'S REPLY TO MOTION OF APPELLEE FOR DISMISSAL OF THE APPEAL

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THE QUESTION IS SUBSTANTIAL

Appellant W. R. Arthur & Co., Inc. respectfully replies, pursuant to Rule 16 of the Revised Rules, to the Motion of the Appellee, Wisconsin Department of Taxation, to dismiss the appeal.

This appeal fundamentally involves determination whether appellant taxpayer has been denied its right to due process under Article XIV of The Amendments to the Constitution of The United States, by virtue of the method appellee adopted to apportion appellant's income between

Wisconsin and the other states in which it conducted its unitary business.

Appellant taxpayer derives its income from the performance of services in interstate commerce as well as intrastate commerce. Appellee's brief states that "all" of the transportation services originated at Janesville, Wisconsin. There were, however, as stated in Appellant's Jurisdictional Statement, services in Illinois intrastate commerce, services in interstate commerce between points in states other than Wisconsin and services in interstate commerce from points outside Wisconsin to Wisconsin. The record shows these were responsible for approximately two percent of appellant's gross revenues.

The principal transportation services of appellant originated in Janesville, Wisconsin, and were performed to points in ten states, including Wisconsin. Four of the ten destination states were authorized to be served on May 21, 1956.

The evidence established that ninety percent of the cargo deliveries were made to points in states other than Wisconsin. As shown in our Jurisdictional Statement, the services producing appellant's gross revenues were of four varieties:

(1) A rate for each mile of transportation for each automobile or truck. The evidence establishes that the revenue mileage in Wisconsin varied during the four tax years in question from a low of 49.997% in 1954 to a high of 55.776% in 1953.

(2) A surcharge for the loading and unloading services of each automobile which was $3.00 to June 20, 1955, $3.50

thereafter until October 1, 1956 and $4.25 thereafter. Truck-loading and unloading services were one-third higher. Ninety percent of the unloadings occurred in states outside Wisconsin.

(3) A surcharge for each 150 mile block of transportation after the first 150 miles. This was 75 cents per automobile with trucks one-third higher. The geographical location of Janesville resulted in this surcharge being applied principally to movements outside Wisconsin.

(4) A surcharge of $1.50 per automobile where the entire load was not delivered to a single consignee. Since 90% of the unloadings occurred outside Wisconsin, this source of revenue is substantially non-Wisconsin.

The record, therefore, clearly establishes that gross revenues were derived to a substantial extent, from services performed by appellant taxpayer in states other than Wisconsin. The appellee, disregarding such facts, has made an assignment of 100% of such revenues to Wisconsin for utilization as a factor in a three factor formula. The remaining factors employed, consisting of proportion of payroll in Wisconsin, and proportion of revenue miles in Wisconsin, are factual and not challenged by appellant taxpayer.

We do not contend that a factor which assigns 100% to Wisconsin may in no case be used in a multi-factor tax formula. Our contention is that it may be used only where it is factually supported by the record.

If, in the instant case the appellee had utilized a 100% factor assigned to Wisconsin for appellant taxpayer's payroll, it would have been clearly arbitrary, because the facts

show that appellant's payroll was paid to compensate services performed in many states other than Wisconsin as well as to compensate the executive and other employees performing services in Wisconsin.

If, in the instant case the appellee had utilized a tangible property factor, and in disregard of the facts had assigned 100% thereof to Wisconsin, it would be clearly arbitrary because the evidence shows tangible property was located in a number of states besides Wisconsin.

If, in the instant case the appellee had utilized a mileage factor, and in disregard of the facts had assigned 100% thereof to Wisconsin, it would likewise be clearly arbitrary because it disregarded the facts.

Instead, what appellee has done here is this; in disregard of the facts clearly showing that a substantial part of appellant's revenues were derived from services performed outside Wisconsin, 100% of such revenues are nevertheless assigned to Wisconsin as a factor, merely because payment is received in Wisconsin. Such assignment is equally arbitrary.

The record established that the sales activities of the appellant which give rise to its single contract with General Motors Corporation took place in Michigan.

Thus, whether the factor of gross revenues, or originating revenues as appellee calls it, is analyzed from the standpoint of where the services are performed from which revenues arise, or from the standpoint of the place where the contract giving rise to the revenue is negotiated, the record will not permit a factual finding that gross revenues should be assigned 100% to Wisconsin.

The appellee devotes considerable space to the description of the tangible property of the appellant in Wisconsin and attempts to minimize its property in other states. The facts are in this record. The record shows that in 1953 73.217% of the appellant's tangible property was located in Wisconsin, in 1954 68.131%, in 1955 66.209% and in 1956 67.373%. Had the appellee employed the same as a factor, it would have been factually correct and not subject to attack. Instead appellee adopted the 100% gross revenue factor which has no factual basis.

The appellee has measured the contribution of the general office of the appellant taxpayer, in obtaining, managing, directing, supervising, and keeping business, by the adoption of the payroll factor. That factor assigns all home office activities to Wisconsin and is factually sound.

A REASONABLE FORMULA MUST BE COMPOSED OF REASONABLE FACTORS

The appellee concedes that were the gross revenue factor of assignment of 100% of the taxpayer's revenues to Wisconsin used as a single factor, it would be clearly illegal. It argues, however, that such illegality is cured when combined with two factually sound factors. It argues that if the result of the formula is reasonable, the factors comprising it are all reasonable.

It is appellant's position that each factor employed must be factually sound. In no other possible way can the result achieved by combining factors be reasonable.

This Court reversed in *Hans Rees' Sons v. North Carolina*, 283 U. S. 123, 75 L. ed. 879, 51 S. Ct. 385, because the

taxing authority had ignored the factual situation and utilized an arbitrary formula.

As pointed out in our Jurisdictional Statement this Court has consistently held that an income tax upon a taxpayer conducting its business activities in more than one state can be sustained, only if it is not discriminatory and is properly apportioned to the activities within the taxing state.

A formula containing a factor or factors which are not factually sound, fails to measure the taxpayer's activities within the taxing state. The greater number of non-factual factors utilized, the greater the degree of discrimination.

In the instant case we have one such factor. Its impact is necessarily one-third and to that extent it arithmetically sullies and proportionately distorts the result. It thus subjects a portion of the taxpayer's income to multiple taxation.

Interstate commerce may not be subjected to the burden of multiple taxation.

> *Portland Cement Co. v. Minnesota*, 358 U. S. 450, 79 S. Ct. 357, 3 L. ed. 2d 421, 67 ALR 2d 1292.

> "An apportionment formula is not valid if it assigns to a state as a tax measure income that could not reasonably be said to result from activities or properties within its boundaries."

> *So. Pac. Co. v. McColgan*, 68 Cal. App. 2d 48; 156 Pac. 2d 81.

This issue has grave consequences to the appellant taxpayer and indeed to every industry engaged in a unitary business in more than one state.

It is therefore respectfully contended that the Supreme Court of the United States should take jurisdiction over this appeal.

Respectfully submitted,

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